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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

—against—

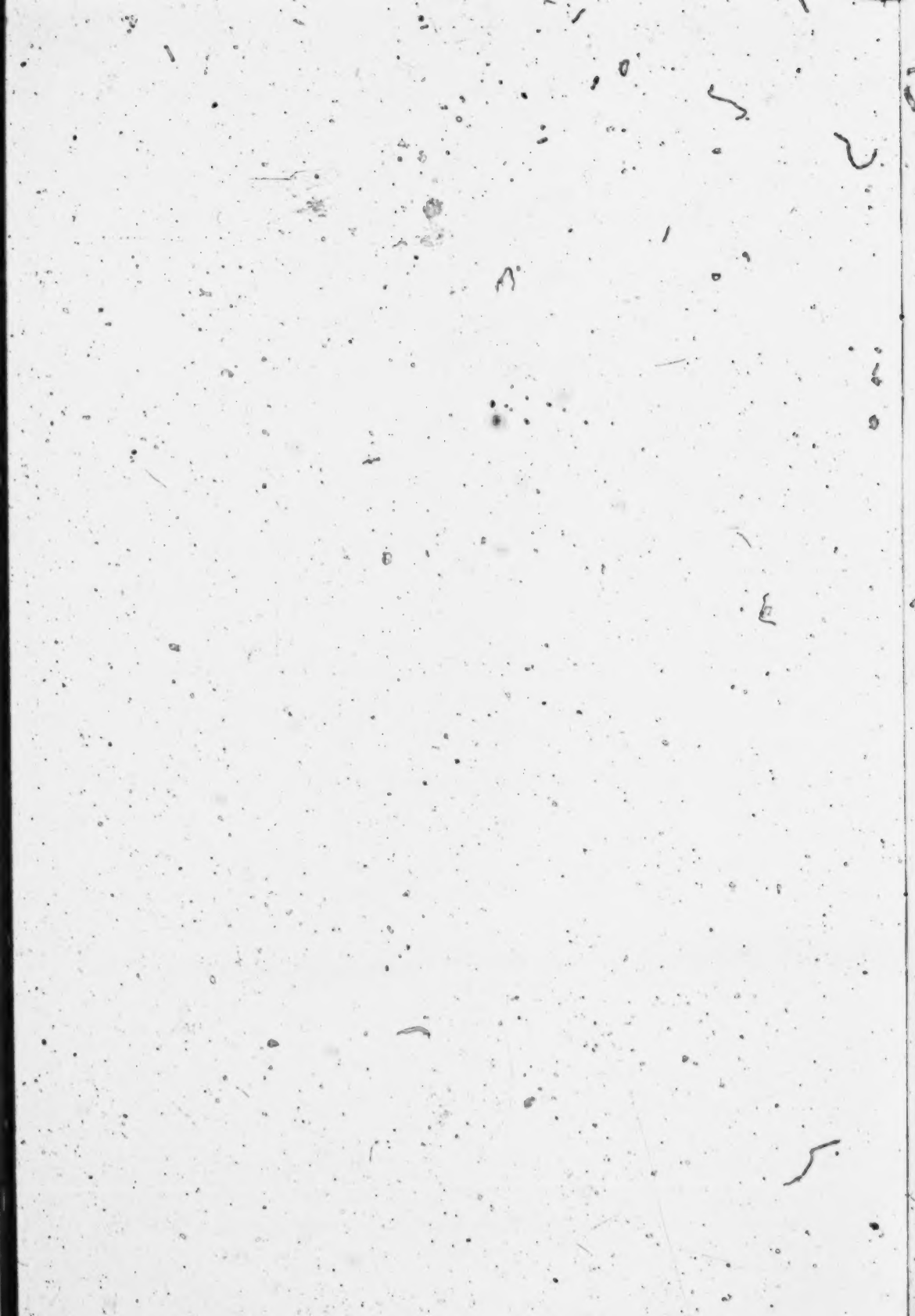
S. H. KRESS AND COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

ELEANOR JACKSON PIEL
36 West 44th Street
New York, N. Y. 10036
Attorney for Petitioner

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y. 10010
Of Counsel



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Summary of the Argument

1. The District Court should not have granted summary judgment on the conspiracy charge Miss Adickes brought against Kress and the Hattiesburg police. For the combined illegal actions in refusing service to Petitioner Adickes because she, a white, was in the company of Negroes (by Kress), for denying library service to Negro children accompanying Petitioner and arresting Petitioner for vagrancy (by the Police) were intimately related in time and effect. The affidavit denials produced by Kress were insufficient to sustain the moving party's burden of proof *First National Bank v. Cities Service*, 391 U.S. 253 (1968). In addition, the moving party resisted and suppressed discovery proceedings which would have shown the long-standing policy of segregation at Kress as to physical facilities.

2. The requirements of 42 U.S.C. §1983 were met as to both color of state action and color of custom and usage in the refusal of Kress to serve Miss Adickes as demonstrated by a series of Mississippi legislative acts disapproving of this Court's opinion in *Brown v. Board of Education*, 347 U.S. 483 and by the admitted interpretation of the Kress waitress of the custom against integration of the races in public places in Mississippi in 1964 when she said in effect to petitioner at the time she refused service we have to serve the colored but not the whites who accompany them.

3. Recent action by this Court consistent with the Congressional intent at the time of the Reconstruction Con-

gress has revised the constitutionality of the Civil Rights Act of 1875 which is applicable to the case at bar. See *Bell v. Maryland*, 378 U.S. 226, 297, 298 n. (1964). *Jones v. Mayer*, 392 U.S. 409 (1968) applied similar reasoning to little-invoked 42 U.S.C. §1982. Also see *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

The issue is squarely before this Court because it was raised in the questions posed in the petition for certiorari. Rule 23 (1) (c) of this Court.

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SANDRA ADICKES,

Petitioner,

—against—

S. H. KRESS AND COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

POINT I

The motion for summary judgment on the conspiracy count was erroneously granted on inadequate affidavit evidence in the face of contrary evidence and evidentiary inferences in the record.¹

Respondent failed to show by affidavit or otherwise, on motion for summary judgment, that the facts surrounding the charge of conspiracy between respondent Kress and the Police in arresting petitioner for vagrancy were not susceptible of the interpretation petitioner asserted.

Scolnick v. Lefkowitz, 329 S.2d 716 (2 Cir. 1964), cert. den. 379 U.S. 825 is inapposite to the facts in the case at bar—the Court of Appeals there stated that: “The plain-

¹ Answering Point I of Respondent's brief (RB 13 et seq.).

tiffs vaguely assert that the defendants departed from the scope of their official duties in a conspiracy to incarcerate them illegally in a mental institution." As against a vague assertion, defendant there offered "detailed affidavits categorically denying the existence of such a conspiracy"—but even more important the record showed that as against plaintiffs' charge of wrongdoing, "The defendants' conduct is clearly privileged as in the exercise of their official, quasi-judicial functions."

Respondent Kress cannot plead any such "privilege". Nor did it offer a detailed or competent denial of the conspiracy charges as will appear *infra*.

Respondent breaks down petitioner's conspiracy allegations into three categories and deals with each of these categories independently—(1) the library incident, (2) the refusal to serve petitioner and (3) the arrest of petitioner for vagrancy.

Respondent terms "preposterous" the connection of the incident at the library with any conspiracy [RB 44]. Concededly, at the time the court ruled on the summary judgment there was no direct evidence that respondent played any role in having petitioner and the six Negro children who accompanied her, evicted from the Hattiesburg Public Library. There was a definite connection established, however, between the librarian and the Chief of Police and the record is clear that the librarian made a number of telephone calls.²

² Q. Then what did they (Miss Adickes and the six Negro children) do? A. They decided to stay, and we sat down and the librarian made a number of phone calls and we were there for about—between twenty minutes and a half hour before the police chief came [A 70].

The next incident chronologically was the refusal to serve petitioner by Kress—a conceded refusal to serve [RB 21]. In its brief, this concession is made by respondent, but the brief argues that the denial of service was neither “conspiratorial” or “based upon race, color or creed.” On this issue, respondent failed to offer by way of affidavit, deposition or otherwise convincing proof that the refusal to serve petitioner was not based on her association with Negroes or that there was no connection with the police at the time of the refusal to serve her. There is no denial by affidavit or otherwise as to reason given petitioner for the refusal to serve. The waitress said to petitioner:

“I am not serving you.” In answer to “Why not?” She said: “We have to serve Negroes, but we are not serving whites who come in with them.” When asked if she realized that it was a violation of the Civil Rights Bill she said: “Yes, we know. But my manager told me not to serve you” [A 76].

Respondent produced a statement of Miss Freeman, the waitress which, although not using exactly the same words, was confirmatory of petitioner’s conversation with the waitress as she reported it at the deposition and at the trial [A 177].³

Although a notice of motion was served on respondent to produce Miss Jo Ann Baggett, the Kress food counter supervisor on the day of the incident, Kress refused to produce her for deposition, nor did Kress offer any affi-

³ Respondent denies that this unsworn statement was “offered”—the statement, however, was produced by respondent as petitioner had no access to Miss Freeman in the pre-trial discovery proceedings. The statement was marked Exhibit 9 in the deposition of Gordon Powell [A 177].

davit on her part to deny that she took part in any conspiracy, although she was described by the store manager, Gordon Powell, as the one person in the store with whom he discussed policy concerning "mixed groups" [A 131, 132]. She was also the person who, according to the unsworn statement of the waitress, Dolores Freeman, issued the instruction not to serve petitioner [A 177].

In further support of the apparent hypocrisy of the respondent as to its policy of non-discrimination in service on racial grounds, is the self-serving affidavit of Louis P. Johnson, the President of Kress, offered in support of the motion for summary judgment [A 104, 105]. Mr. Johnson stated categorically in his affidavit: "It is and has been the policy of Kress not to discriminate against any person because of race, color or creed." In support of this statement, Mr. Johnson attaches a notice to all store managers, dated July 15, 1964—13 days after the Civil Rights Bill (42 U.S.C. 2000 et seq.) became the law of the land. That statement says *inter alia*: "We may no longer segregate facilities such as Food Departments, rest rooms, cloak rooms, toilets, lounges and drinking fountains . . . you are to immediately check to be sure that Food Departments, drinking fountains, lunchrooms, cloak rooms, toilets, lounges, etc. are not designated either for Colored or White. Any signs which are still on the doors or walls are to be removed."

The clear implication of this is that as of July 15th and perhaps August 14, 1964, there were still segregated facilities in Respondent's stores—it certainly does not support, and is at variance with the sweeping affidavit declaration that it "has been [indicating long-time custom] the policy of Kress not to discriminate against any person because

of race, color or creed." Moreover, when, by interrogatory, petitioner initially sought to ascertain whether or not on August 14, 1964, the toilet and drinking fountain facilities at the Kress Hattiesburg store were in fact segregated by race, respondent refused to answer and that refusal to answer was upheld by the District Court below as irrelevant [See this brief *infra* p. 21].⁴ Then, with this ruling the law of the case, respondent continued to bar petitioner from ascertainment of the facts in the deposition of Mr. Powell who was again asked concerning separation of the races and the facilities in the Hattiesburg store, and was instructed not to answer [A 128].

Respondent has crossed the credibility line when it asserts in its brief, page 44: "There is not, and cannot be, any claim that Kress segregated the races in its Hattiesburg store."

At the time the District Court ruled on respondent's motion for summary judgment, in addition to the clear evidence before the court of refusal to serve petitioner because, she, a white, was in the company of Negroes, there was evidence that a member of the police department who later was to arrest petitioner on a charge of vagrancy, came into the Kress store during the time that the petitioner sought food service. Accordingly, at this juncture the refusal to serve petitioner and her subsequent arrest on the charge of vagrancy become associated chronologically and factually. There were no facts offered by respondent, by affidavit or deposition which conclusively

⁴ Petitioner prints at the conclusion of this brief copies of the order of the District Court of April 30, 1965 and the pretrial examiner's report of April 27, 1965 on which it was based as an addendum to the joint appendix, heretofore filed (*infra* pp. 21-24).

disassociated the two events joined so closely in time. The various statements and depositions offered support petitioner's inferences of a conspiracy despite respondent's attempt to deny categorically such conspiracy between respondent and the Hattiesburg police.

By another unsworn statement of an employee of respondent, Miss Irene Sullivan, employed as a cashier in its Hattiesburg store on August 14, 1964, it appears that a policeman, Patrolman Hillman—one of the officers who arrested petitioner on a charge of vagrancy within minutes after she left respondent's store—entered the store and exchanged greetings with Miss Sullivan [A 178]. Miss Sullivan denied making contact with Patrolman Hillman in a way which might have caused Miss Adickes' arrest [A 178]. Yet we learn from the deposition of Mr. Powell, the store manager, that the coming in of a "mixed" group to the lunch booth area was anticipated days or weeks earlier, and that in anticipation of the arrival of such a group, and the store taking action against it, certain signs were worked out so as to coordinate the conduct of the store employees toward the service of such a group [A 135]. A reasonable inference, among others, that could be drawn from the statement, affidavit and deposition evidence, is that a "sign" was given by Miss Baggett to Patrolman Hillman directing him to make the arrest of petitioner. There is no denial or testimony by affidavit or otherwise, from Miss Baggett on this subject and petitioner sought in vain to take her deposition [A 121].

Consistent with this position is the affidavit of Hugh Herring, the Chief of Police, offered in support of the motion for summary judgment by respondent, which controverted the conspiracy charge only by denying that he

had any discussion with Mr. Powell, the store manager, concerning Miss Adickes' arrest. This specific and narrow denial was in the nature of a "negative pregnant". The clear inference from such a denial is that discussions between Chief Herring and other employees of Kress could have taken place and either did or could have sparked or cooperated in inducing the arrest.

There are affidavit denials, it is true, by both the arresting patrolmen Emmett Boone and Ralph A. Hillman that they consulted with anyone at all prior to the arrest [A 110, 117]. These denials are controverted by the events and by the testimony of the petitioner.

Miss Adickes testified by way of deposition that she was told by the police at the time of her arrest, immediately upon her leaving the Kress premises where she had been refused service because she was in the company of Negroes, that "We have orders to pick you up" [A 77]. This same statement was repeated to her later at the police station [A 79]. It is here submitted that the affidavit denials of the two police officers are inherently unbelievable. Accordingly, the two patrolmen must have been telling untruths when they said in their affidavits that they made an "Officer's discretion arrest" of Miss Adickes without consultation with anyone, including their Police Chief—particularly where they offered no affirmative explanation for making the arrest, nor is there any other believable reason in the record.⁵

⁵ The Fifth Circuit found that the "conduct which caused the arrest was clearly protected under the provisions of Sec. 201 of the Civil Rights Act of 1964, attempts to enjoy equal public accommodation in a Hattiesburg City Library, and a restaurant in the nationally known Kress store." *Achtenberg, Adickes v. Mississippi*, 393 S. 2nd 468, 474 (1968).

The bare record at the time respondent sought summary judgment under Federal Rule 56 did not contain "affidavits or other evidentiary matter sufficient to show that there [was] no genuine issue as to material fact" on the conspiracy issue. *Robin Construction Company v. U. S.*, 345 F.2d 610, 614 (3 Cir. 1965). A review of the law concerning the appropriateness of summary judgment appears in *Subin v. Goldsmith*, 224 F.2d 753, 758 (2 Cir. 1955) where the Court of Appeals for the Second Circuit in quoting *Colby v. Klune*, 178 F.2d 872, 873-875 (2 Cir. 1949) said: "The statements in defendants' affidavits certainly do not suffice [for the granting of summary judgment] because their acceptance as proof depends on credibility."; in the case at bar, the so-called facts asserted by way of affidavit show within the four corners of the statements themselves inconsistencies which would compel a court to question their credibility.

In a long and reasoned opinion by Mr. Justice Marshall, discussing the facts of the case at length, this Court recently upheld a summary judgment in *First National Bank v. Cities Service*, 391 U.S. 253, 289 [1968]. This Court held that Rule 56(e) of the Rules of Federal Procedure places upon the party opposing summary judgment "the burden of producing evidence" only after the moving party "conclusively showed that the facts upon which [the moving party] relied to support his allegations were not susceptible of the interpretation which he sought to give them."

The respondent made no "conclusive" or even satisfactory showing of the existence of facts which would justify a summary judgment in the case at bar. Respondent opposed discovery which would have revealed the de facto segregation of facilities in the Kress store at the time of

the incident. Although respondent produced the manager of the store for a deposition, it refused to produce the sub-manager, who, according to Dolores Freeman, the waitress, had given the order to her to refuse service to petitioner. Nor did respondent offer any deposition from such sub-manager to deny petitioner's allegations. The affidavits of the arresting officers were inherently unbelievable—and contrary to the law of the case found by another federal court. See *Achtenberg, Adickes v. Mississippi, supra*. The affidavit of the Chief of Police was a negative pregnant which specifically left undenied all other reasonable inferences connecting respondent's conduct with the Police. Finally, testimony of the petitioner by deposition also put in issue the truth and credibility of the assertions of the moving party to this summary judgment. Under these facts it was error for the District Court to grant summary judgment.

POINT II

Petitioner met any "state action" requirement necessary in her allegations and proof of discrimination against her in a public eating establishment on account of race—which discrimination was supported by express Mississippi legislation and by custom and usage in the state.⁶

In attempting to challenge the clear state of the record which shows that petitioner was denied service at Kress because she, a white, was in the company of Negroes, respondent picks and chooses supportive language from cases and doctrines which this Court has repudiated.

⁶ Answering Point III of Respondent's brief (RB 30 et seq.).

Petitioner does not concede that the case at bar involves a "mere private action"; for, as set forth in her brief, pages 23-36, she presents the specific Mississippi statutory authority and discusses the custom and usage which supported respondent's waitress in her propounding of a novel statement of the prevailing discriminatory rule in Mississippi:

"We have to serve colored but . . . not . . . the whites that come in with them" [A 253].

Two cases recently decided by this Court, however, further raise the question as to whether or not private discrimination alone under the circumstances would not be sufficient to state a cause of action under 42 U.S.C. §1983. In *Jones v. Mayer Co.*, 392 U.S. 409, 423 (1968) this Court said of §1982, which preceded §1983 by five years:

"To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by 'state or local law' but also by 'custom or prejudice.'"

Section 1983 clearly speaks in parallel language to §1982 of "color of any statute, ordinance, regulation, custom or usage," of any state.

Respondent refers to petitioner's reliance on the three Mississippi Code Sections and a Senate Joint Resolution, as a "fabricated" "argument." The court below also found it possible to ignore the relevance of these actions by the Mississippi State Legislature to the petitioner's case, and

* Mississippi Code §§2046.5 (1956), 2056 (7) (1954), 4065.3 (1956), Ch. 466 Senate Concurrent Resolution No. 125 (1956).

the plainly contumacious attitude these actions express toward the law of the land. The Mississippi State Legislature adopted these sections and the resolution after this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954); they specifically noted "the segregation laws of this state" and reaffirmed the prohibition of the "mixing or integration of the white and Negro races in public places of amusement, recreation or assembly in the state" [See petitioner's brief p. 24]. This Court will surely share petitioner's bewilderment that the court below could have ignored this clear language as supporting a state policy of the segregation of the races in these sections; and could have stated that, except for the trespass section, §2046.5, the other sections dealt only with school integration and could accordingly have concluded that this language shed "no light on Mississippi customs and usages."

Since these laws were on the statute books of the state at the time of the August 14th incident, it is difficult to understand respondent's reference to their "obvious inapplicability" [RB 33]. So also is it difficult to understand respondent's reference to *Achtenberg, Adickes v. Mississippi*, 393 F.2d 468 (5 Cir. 1958) as "irrelevant." Said respondent [RB 34 footnote]: "That opinion reveals arrests for vagrancy not trespass which were totally unrelated to Kress. There was no proof and no finding that those arrests were related to Kress." A charitable reading of this passage in respondent's brief suggests that respondent simply did not read the plain language of the opinion of the Fifth Circuit Court of Appeals. For that court said in *Achtenberg* of the conduct of Miss Adickes and four other petitioners, as to the facts on that very August 14, 1964 in Hattiesburg, Mississippi: "These petitions for removal to-

gether with the affidavits, clearly support the allegations in the petition that the conduct which caused the arrest of these five persons under the vagrancy statutes or ordinances of the state of Mississippi or the city of Hattiesburg, was conduct clearly protected under the provisions of Section 201 of the Civil Rights Act of 1964; attempts to enjoy equal public accommodations in the Hattiesburg City Library [footnote omitted] and a restaurant in the nationally known Kress store. . . . They alleged that this was the fact. *They proved it at a hearing* which brought no counter proof." [393 F.2d at 474, 475] (emphasis supplied)

Petitioner finds it equally difficult to follow the reasoning of respondent which refers to Mississippi Code §2046.5 as "merely a neutral, colorless statute which provides that a restaurant owner may choose such customers as he pleases" [RB 34]. Respondent then goes on to assert: "In fact this [§2046.5] amounts to no more than a restatement of the ancient common law principle that a restaurant owner who does not offer lodgings to travelers may accept some customers and reject others, on personal or indeed, any grounds, there being no duty to serve all customers" [RB 34].

The scholarship respondent then relies upon to support this proposition is *R. v. Rymer* [1877] 2 Q.B. 136, where the court distinguished a hotel from "a mere shop in which spirits are retailed across the counter." Certainly that "mere shop" is not the same as the Kress lunch counter where people presumably were served victuals.

In contrast to the strained distinctions between an inn and a restaurant urged by respondent, supposedly derived from common law, is a passage from Justice Goldberg's

concurring opinion in *Bell v. Maryland*, 378 U.S. 226, 297 n., 298 (1964):

The treatise [Judge Story on Bailments] defined an innkeeper as "the keeper of a common inn for the lodging and entertainment of travellers and passengers" Story, *Commentaries on the Law of Bailments* (Schouler, 9th ed., 1878), §475. 3 Blackstone, *op. cit.*, *supra*, note 10, at 166, stated a more general rule:

"[I]f an innkeeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages if he, without good reason, refused to admit a traveler." (Emphasis added.) In Tidswell, *The Innkeeper's Legal Guide* (1864), p. 22, a "victualling house" is defined as a place "where people are provided with food and liquors, but not with lodgings," and in 3 Stroud, *Judicial Dictionary* (1903), as "a house where persons are provided with victuals, but without lodging."

Regardless, however, of the precise content of state common-law rules and the legal status of restaurants at the time of the adoption of the Fourteenth Amendment, the spirit of the common law was both familiar and apparent. In 1701 in *Lane v. Cotton*, 12 Mod. 472, 484-485, Holt, C.J., had declared:

"[W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such

an office, under pain of any action against him. . . . If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier. . . . If the inn be full, or the carrier's horses laden, the action would not lie for such refusal; but one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public." See *Munn v. Illinois*, 94 U.S. 113, 126-130 (referring to the duties traditionally imposed on one who pursues a public employment and exercises "a sort of public office").

Furthermore, it should be pointed out that the Framers of the Fourteenth Amendment, and the men who debated the Civil Rights Acts of 1866 and 1875, were not thinking only in terms of existing common-law duties but were thinking more generally of the customary expectations of white citizens with respect to places which were considered public and which were in various ways regulated by laws. See *infra*, at 298-305. Finally, as the Court acknowledged in *Strauder v. West Virginia*, 100 U.S. 303, 310, the "Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect," for those who adopted it were

conscious that a constitutional "principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States*, 217 U.S. 349, 373."

Since *Bell v. Maryland*, moreover, this Court has on two occasions spoken out to condemn as unconstitutional under the Fourteenth Amendment specific state constitutional or legislative enactments which would authorize or permit discrimination between white persons and Negroes. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969). Nor can Mississippi Code Section 2046.5 be read alone or as a "neutral statement of the law" where it is clear from other Mississippi legislative enactment following the *Brown* decision that it was the precise intention of the state legislature to promote and sanction the continuation of racial discrimination and segregation in Mississippi. That legislature—in the same year, 1956, in which it passed §2046.5—condemned the *Brown* decision as "in violation of the Constitution of the United States and the State of Mississippi, and [said] all similar decisions are in violation of the Constitution of the United States and the State of Mississippi and are therefore unconstitutional and of no lawful effect within the territorial limits of the State of Mississippi" [see Petitioner's brief, p. 56].

With this background it is hard to understand respondent's statement:

"Not only is §2046.5 a neutral restatement of common law, but its very existence is in form only. The actions of the Mississippi legislature which gave birth to the statute occurred almost a decade before the incident

which is the subject of the present case. Since its enactment the statute has withered into oblivion never having been enforced by the State" [RB 38].*

Respondent cites a number of cases from the Fourth Circuit involving a redoubtable Negro attorney named Williams who sought to establish his right to be served at restaurants of the Howard Johnson chain. See *Williams v. Howard Johnson Restaurant*, 268 F.2d 845 (1959), *Williams v. Howard Johnson's Inc.*, 323 F.2d 102, reaff'd *Williams v. Lewis*, 342 F.2d 727 (1965), cert. den. 382 U.S. 814 (1965). Whether or not this Court would, in 1969, affirm those rulings, it is significant that the Fourth Circuit sitting en banc must have considered that the passage of the 1964 Civil Rights Act affirmatively changed the legal status of persons suing to establish a right not to be discriminated against in a restaurant after passage of the Civil Rights Act.⁹

Petitioner finds equal difficulty in understanding respondent's assertions that there is a clear mandate in §1983 that a custom of segregation, if alleged "must be enforced

* In this connection compare *United States v. Guest*, 383 U.S. 745 (1966) and *United States v. Price*, 383 U.S. 787 (1966) concerning the "oblivion" to which the spirit behind §2046.5 was relegated by some law enforcement officers and white citizens of the State of Mississippi in the summer of 1964.

⁹ "Under Virginia law, a restaurant owner is not an innkeeper charged with a common law duty to serve everyone who applies. He may accept some customers and reject others on purely personal grounds. *Alpaugh v. Wolverton*, 184 Va. 934, 36 S.E.2d 906, cited and discussed by this court in *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4 Cir. 1962), and *Williams v. Howard Johnson's Inc. of Washington*, 323 F.2d 102 (4 Cir. 1963). Plaintiff's asserted cause of action arose years before the 1964 enactment by Congress of laws materially affecting civil rights." *Williams v. Lewis*, *supra* p. 730 n.

by the state before it may ground a cause on action" [RB 40]. This Court noted in *Jones v. Mayer*, 392 U.S. 409, 423 (1968), that the language of §1982 refers to law and to custom as alternative and equally illegal auspices under which a citizen may be deprived of his constitutional rights;¹⁰ these alternatives are similarly spelled out in §1983.

Respondent asserts, without any recitation of authority that Congressional action in defining discrimination or segregation under 201(d) of the Civil Rights Act of 1964 [42 U.S.C. §2000(a)(d)], "clarifies" the word "custom" as used in §1983 passed by a Reconstruction Congress nearly 100 years before [RB 41]. Whether or not this statement of respondent concerning "state action" is true, this Court need not meet that issue since, as petitioner has repeatedly pointed out above the State of Mississippi by statutory

¹⁰ Several weeks before the House began its debate on the Civil Rights Act of 1866, Congress had passed a bill (S. 60) to enlarge the powers of the Freedmen's Bureau (created by Act of March 3, 1865, c. 90, 13 Stat. 507) by extending military jurisdiction over certain areas in the South where, "in consequence of any State or local law, . . . custom, or prejudice, any of the civil rights . . . belonging to white persons (including the right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . .) are refused or denied to Negroes . . . on account of race, color, or any previous condition of slavery or involuntary servitude. . . ." See Cong. Globe, 39th Cong., 1st Sess. 129,209 (emphasis added). Both Houses had passed S. 60 (see *id.*, at 421, 688, 748, 775), and although the Senate had failed to override the President's veto (see *id.*, at 915-916, 943) the bill was nonetheless significant for its recognition that the "right to purchase" was a right that could be "refused or denied" by "custom or prejudice" as well as by "State or local law." See also the text accompanying nn. 49 and 59, *infra*. Of course, an "abrogation of civil rights made 'in consequence of . . . custom, or prejudice' might as easily be perpetrated by private individuals or by unofficial community activity as by state officers armed with statute or ordinance." J. tenBroek, *Equal Under Law* 179 (1965 ed.). (*Jones, supra*, p. 423.)

enactment has given its state sanction to the long established custom of segregation of the races in public places in Mississippi and indeed, respondent's employee was merely asserting that custom when she told petitioner: "We have to serve the colored, but we are not going to serve the whites who come in with them" [A 253].

Respondent uses a further bootstrap argument when it states: "Furthermore, the proof in the record establishes that Kress was not aware of and did not act pursuant to §2046.5 or any custom or usage, but rather for good cause to avoid serious violence at the moment" [RB 44]. The record on trial is bare of any such evidence. Respondent sought, by producing its store manager Powell at a deposition prior to trial, to introduce this defense to the accusation. Powell did not—in fact could not—deny what petitioner said the waitress said to her. Nor could what was said at the deposition be considered by this Court as relevant to whether or not petitioner presented a prima facie case at trial.

The conduct of which petitioner complained when she filed her complaint against respondent was precisely the kind of discrimination which the Reconstruction Congress in 1871 sought to reach when it passed §1983. The facts in the case at bar squarely present a case of deprivation of rights, privileges and immunities secured by the Constitution and laws effected by respondent acting both under color of statute and under color of custom and usage prevailing in the State of Mississippi on August 14, 1964. Accordingly, it was error for the District Court to direct a judgment against the plaintiff.

POINT III

Recent Supreme Court rulings have revived the constitutionality of the Civil Rights Act of 1875.¹¹

When this Court granted certiorari one of the questions certified for review was Number 3 (see Petitioner's brief p. 2):

"Whether Petitioner, deprived of her constitutional rights as described in questions 1 and 2 above, is entitled to statutory damages against Respondent pursuant to the Civil Rights Act of 1875, for being denied the right to the use of a public accommodation."

All of the questions presented are squarely before this Court as there was no limitation in its granting review of the issues.¹²

Nor is the claim of Petitioner that she could invoke the provisions of the Civil Rights Act of 1875 as totally without merit as respondent seeks to impress this Court.

In *Jones v. Mayer Co.*, 392 U.S. 409 (1967) this Court reviewed the Civil Rights Act of 1866, 42 U.S.C. §1982 in permitting a Negro, discriminated against by private persons in the purchase of property, to sue because his

¹¹ Answering Point II of Respondent's brief (RB 26 et seq.).

¹² Respondent cited three criminal cases purportedly holding that an issue not argued in the Court of Appeals may not be raised by this Court (RB 26). *Lawn v. United States*, 355 U.S. 339, 363 cited by respondent, based its holding on the fact that the issue challenged "was not mentioned in the petition for certiorari filed in this Court and cited Rule 23(1)(c) of this Court which provides that only questions set forth in the petition or fairly comprised therein will be considered by this Court.

right to purchase real property was impinged by "custom or prejudice," unassisted by "State or local law." The quotation from Mr. Justice Goldberg cited *supra* pp. 13-15, is in contradiction to the authority invoked by respondent from the Fourth Circuit based on the series of *Williams* cases *supra* p. 16.

Respondent's reliance on the 1964 Civil Rights Act is misplaced for although its passage may have enlarged the rights for and on behalf of our minority citizens, it has not narrowed them. This Court has found that intention to be the elimination of race segregation in public places — "to obliterate the effect of a distressing chapter of our history." *Hammy v. Rock Hill*, 379 U.S. 306, 316 (1964).

CONCLUSION

The judgment of the Court below should be reversed and the case remanded to the District Court under appropriate instructions permitting Petitioner to sue for damages under 42 U.S.C. §1983 and the Civil Rights Act of 1875.

Respectfully submitted,

ELEANOR JACKSON PIEL
36 West 44th Street
New York, New York 10036
Attorney for Petitioner

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010
Of Counsel

November, 1969

ADDENDUM TO JOINT APPENDIX

Order of the District Court of April 30, 1965

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Civ. 3426

SANDRA ADICKES,

Plaintiff,

~~—against—~~

S. H. KRESS & COMPANY,

Defendant.

Defendant's motion pursuant to Rule 33 of the Federal Rules of Civil Practice seeking an order striking out certain interrogatories propounded by plaintiff having come on to be heard before the undersigned in the Motion Part on April 22, 1965, and said motion having been referred to Pre-Trial Examiner, Gregory J. Potter, for hearing and report, and the Pre-Trial Examiner having reported on April 27, 1965, and the court being fully advised, and plaintiff having withdrawn interrogatory #4, it is

ORDERED that defendant's motion with respect to interrogatory 15 is granted, and, in all other respects, defendant's motion is denied, and it is further

ORDERED that answers to interrogatories as to which objections were overruled shall be served within 30 days from the date of this order.

JOHN M. CASHIN
U.S.D.J.

Dated, New York, N. Y.
April 30, 1965

Pre-Trial Examiner's Report of April 27, 1965**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

SANDRA ADICKES,*Plaintiff,***—against—****S. H. KRESS & COMPANY,***Defendant.*

Defendant's motion pursuant to Rule 33 of the Federal Rules of Civil Procedure seeking an order striking out certain interrogatories propounded by plaintiff came on to be heard before Judge Cashin in the Motion Part on April 22, 1965 and was referred to the undersigned for hearing and report.

At the hearing conducted in accordance with said instruction, plaintiff withdrew interrogatory #4 and the attorney representing defendant stated that the objections to the remaining interrogatories could be placed into two categories, namely:

1. All of the interrogatories objected to with the exception of interrogatory #15 inquire with respect to a period of time that cannot be material to the instant law suit, and
2. Interrogatory #15 is clearly irrelevant.

To properly view the objections raised, a brief review of the issues raised by the pleadings is in order.

Plaintiff brings this action to recover damages allegedly sustained as a result of a conspiracy to which defendant was a party which deprived her of her civil rights. Plaintiff, a female Caucasian school teacher, residing in New York, claims that while she was in Hattiesburg, Mississippi, as a volunteer teacher at a Freedom School sponsored by the Council of Federated Organizations, she, together with six negro students, attempted to use the facilities of Hattiesburg Public Library. They were refused the use of said facilities and were requested to leave. Thereafter plaintiff together with the six negro students went to the store owned and operated by defendant for the purpose of having lunch. It is claimed that while having lunch a waitress in the employ of defendant, while accepting the orders of the negro students, refused to serve plaintiff because she was accompanied by negroes. As a result of this wilful and malicious conduct, plaintiff claims damages in the amount of \$50,000.

As a second cause of action plaintiff claims that while she was sitting at the booth of defendant's store, an officer of the law entered the store and observed plaintiff. When plaintiff and the negro students left the store, she was arrested and taken into custody. Plaintiff claims this arrest, upon information and belief, was due to a conspiracy between defendant and the Chief of Police, and that as a result thereof plaintiff was damaged in the amount of \$500,000.

Defendant's principal ground with respect to the objections to interrogatories (other than interrogatory #15) is that said interrogatories inquire with respect to matters during a period from January 1, 1964 until August 14, 1964.

Defendant contends that since plaintiff's claim involves an incident at the store which took place on August 14, 1964, plaintiff should not be allowed to inquire with respect to events in January of 1964. Defendant contends that at best plaintiff's inquiry should be limited from July 4, 1964, the date she arrived in the State of Mississippi.

Plaintiff wishes to prove that the policy of the store with respect to the service of negroes and whites changed on or after July 2, 1964, the date of the passage of the Civil Rights Act of 1964. Plaintiff wishes to prove that the policy of the store was to discriminate prior to the passage of the Civil Rights Act, and that, in fact, the discrimination alleged by plaintiff was merely a continuance of the prior policy.

Predicated upon the liberal discovery rules of the Federal Court, I would recommend that defendant's objections to these interrogatories be overruled. Answers to said interrogatories may very well lead to admissible evidence.

Interrogatory #15 inquires whether on August 14, 1964, the use of toilet facilities at the Hattiesburg store were segregated by race and, thereafter, in three subdivisions seeks the number of toilets on the premises, whether any water fountains were on the premises and, if so, the exact location of each and whether said water fountains were segregated by race.

I believe that this area of inquiry is so far removed from any relationship to the issues in this case that defendant's objections should be sustained.

Respectfully submitted,

GREGORY J. POTTER

Dated, New York, N. Y.

April 27, 1965

